Fighting Prison Overcrowding with Penal Populism – First Victim: the Rule of Law

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On March 7th, a new Hungarian law came into force, allegedly intended to stop the “abuse” of compensation claims due to inhuman conditions in prison (“abuse law”). The law orders the state to halt payments to those claimants that are granted executable claims in a final court order, based on to this day valid compensation rules, after the “abuse law” came into effect. Ostensibly, this is done only until a new law is adopted that would redraw compensation rules and will also contain a detailed policy to reduce prison overcrowding. Even if this turns out to be yet another populist gimmick, and these compensations will ultimately be paid, the new legislation has important ramifications for the rule of law in Hungary because it sends the message to the citizens and the courts that the finality of judgements and court rulings are relative.

Hungary: Prison Overcrowding Champion

The backstory of the new law goes a long way. Hungary, like many new democracies, inherited a fairly punitive penal system from the socialist era, with a high percentage of prison sentences in international comparison. At the time of the transition, prison population had been falling as a cumulative effect of the dismantling of the justice system of a more oppressive dictatorship, decriminalization, and a general amnesty in 1990. This was a positive development, especially in the sense that most prisons, many of which were built during the Austro-Hungarian Monarchy, were operating close to capacity or above in the late 1980s.

Yet this trend was soon reversed. As it often happens in times of fundamental institutional and societal transformation, crime rates skyrocketed: from 341.000 in 1990 to close to 600.000 in 1998. Rising crime rates started to increase the pressure on the prison system. Successive governments, left-wing or conservative, did little to alleviate this. While penal populism did not really take hold in Hungary until the last few years, no government was willing to take the electoral risk of a comprehensive sentencing and prison reform. As a result, prison overcrowding was steadily creeping up towards 143% in 2014, the highest in a Council of Europe member state. Successful claims from inmates before the European Court of Human Rights (ECtHR) for the violation of their rights under Article 3 of the European Convention on Human Rights (ECHR) also steadily rose as a result.

A Veritable Mix of Penal Populism, Tricks and Bluster

Not willing to spend financial capital on prison reform or forego some political capital by abandoning its increasingly populist credentials, in 2010 the government resorted to outright manipulation. It changed the regulation that determined the minimum amount of living space, which required that each inmate has 6 cubic meters of airspace and 3 or 3,5 square meters of living space (for male and female detainees respectively), excluding the space occupied by beds, tables, chairs, the sink and the toilet by adding the words “as far as it is possible”, effectively turning a formerly prescriptive rule into a *lex imperfecta* (Section 137 of Decree no. 6/1996. (VII.12.), as amended with effect from 24 November 2010). In 2014, the Constitutional Court found this amended regulation to be unconstitutional. The Court held that the prohibition of inhuman and degrading treatment enshrined in Article 3 of the ECHR and Article III (1) of the Constitution obliges the state to legally ensure a minimum living space in a cogent norm. As a ratifying Party, the state cannot simply legislate to declare compliance with the Convention aspirational: it is legally obliged to comply.

Soon after, the ECtHR also concluded that prison overcrowding in Hungary constitutes a structural problem and entered a pilot judgement in the matter (*Varga and Others v. Hungary*). The decision required Hungary to create compensatory remedies for the violation of Article 3 of the Convention in domestic law within six months of the pilot judgement. Furthermore, the country also was to undertake a comprehensive effort to reduce prison overcrowding, which the ECtHR stressed can be best achieved by a sentencing reform that aims to increase the applicability of non-custodial sanctions.

The government’s response was threefold. First, true to its law and order credentials, it announced a large-scale prison building program to address prison overcrowding.

Second, in line with the legally binding obligations from the Strasbourg judgement, it amended the law regulating the execution of criminal sanctions with a new form of remedy, in order to handle claims of inhuman treatment within domestic law and keep them from reaching ECtHR (i.e. Sections 10/A-10/B. of the Act Nr. 240 of 2013 on the Execution of Criminal Sanctions Custodial Administrative Sanctions, as amended with effect on 1 January 2017). This new form of claim procedure, provided the remedies within the prison service (formal complaint to the prison director, relocation or other measures) are exhausted (and given the abysmal conditions in most of the prisons, these will likely be impossible), foresaw a compensation for inhuman conditions, such as the lack of separation of toilets from the living quarters within the cell, lack of ventilation, light, heating or pest control at a minimum of 1200 HUF (around 3 EUR) and a maximum of 1600 HUF (around 4 EUR) per day for every day spent in those conditions. The rules also stipulate that the compensation for inhuman conditions shall first be used to cover outstanding compensation or tort claims granted to the victim of the crime, as well as child support. Only if these

are fully covered can the compensation, or whatever is left of it, be paid out to the inmate.

And third, the government also doubled down on legal tricks and changed the regulation about how cell space is calculated. The amendment surgically removed the space occupied by beds, chair and tables from the one needed to be deducted from the surface area of the cell when calculating the living space, leaving only the toilet and the sink (Section 121 of Decree Nr. 16/2014 (XII.19.) as amended with effect on 1 January 2017). As beds and the tables occupy most of the place in a cell, this trick had the effect of overcrowding magically being reduced overnight.

These cosmetic changes did contribute to official overcrowding rates falling from 129 % to 113 % in 2018, but this only masks the failure of the government to address the root problem. The prison building program, either due to struggles over the lucrative contracts or simply due to incompetence and mismanagement, went nowhere. Out of the 8 new prisons planned to be completed in 2019, only one has been built as of March 2020, and even that is not a new building but a repurposed former refugee processing centre.

Compensation claims, now allegedly called “heringpénz” (approx. “money for the sardines in the tin”) in prison parlance, began piling up: while in 2017 courts reached a final ruling in 2145 compensation claim procedures, this number jumped to 7778 in 2018 and 12279 in the period between January and November 2019.[1)]These numbers include rejected claims, but excluding claims rejected on formal inadmissibility grounds. Source: Response to a Freedom of Information Request of the Hungarian Helsinki Committee by the National Office of the Judiciary (2019.OBH.XII.B.31/5, 2020.01.16). The author is grateful to the Hungarian Helsinki Committee for providing this data. Even without any data on the content of these rulings, it can be safely assumed that granted compensations rose significantly with the absolute number of procedures. Partly because overcrowding itself has not been addressed, partly because of the quasi-automatism coded into the new rules on compensation. The government claims that so far, the state has paid over 10 billion HUF (approx. 30 million EUR) in compensation. According to a response of the Ministry of Justice to a freedom of information request of the Hungarian Helsinki Committee, the official number comes close, thus the payments altogether do constitute a considerable sum.[2)]According to the response, the total compensation claims paid by the state was approx. 679 million HUF in 2017, 3,16 billion HUF (9,2 million EUR) in 2018 and 4,42 billion HUF (13 million EUR) in 2019. In the period 2017 january 1 and 2019 february 28 the largest claim paid amounted to 10,2 million HUF (30.000 EUR), the smallest to 1200 HUF, the daily minimum according to the law. Source: Response to a Freedom of Information Request of the Hungarian Helsinki Committee by the Ministry of Justice (V/57/3/2019 and V/37/2/2020). But this is largely the government’s fault. It failed to address the root of the problem by a sentencing reform, and it proved even unsuccessful in its own law and order game of treating prison overcrowding with a prison building program.

Penal Populism Redux

Far from admitting its failure, the government doubled down on populist rhetoric. In his big annual speech kicking off the political year, the Prime Minister, somewhat unexpectedly, declared the heretofore obscure problem of rising compensation claims, now rebranded as “börtönbiznisz” (“prison business”), one of the greatest threats to the integrity of the state. In his description, courts meekly assist “Soros-financed NGOs” and prisoner transport-chasing attorneys in slapping victims in the face and granting criminal millions for inconveniences they actually deserve. In the government-connected media, one horror story followed the other about hardened criminals receiving tens of thousands of euros in compensation for not having enough sunshine in their cell.

This populist rhetoric against the usual suspects such as “Soros-founded NGOs” was followed, however, by what appeared to be a more coordinated campaign against the justice system. Attorneys were one of the targets. An unverifiable list of the highest attorney’s fees received for handling compensation claims was leaked in the media. Attorneys, it was insinuated, were driving the “prison business” by actively seeking out potential claimants in prisons. Now of course it is irrelevant whether someone defending an accused murderer is doing so because they believe in the defendant’s innocence or because of the attorney’s fees. Whatever the motivation of the defence attorney, they are serving justice and the rule of law just by providing defence. Equally, whatever is driving them, attorneys handling claims are asserting the human rights of detainees.

More worryingly, judges were also targeted. They were depicted as at best naïve handmaidens in a dark plot to enrich criminals and reroute money from the victims of the crime to the perpetrators and their attorneys. This is, of course, nonsense. First, the courts did not make the law: it was adopted by an earlier FIDESZ majority, with many MPs who are now railing against it having voted for it. Second, the compensation rules do not leave much discretion to the judge in determining the size of the compensation: it prescribes a relatively narrow range for a daily amount which is then multiplied by the number of days spent in inhuman conditions. As long as prison conditions continue to be inhuman for a large number of inmates, courts have no choice but to grant compensation. To change this is within the realm of the government and not the courts. Third, the rules already explicitly stipulate that victims’ claims have to be covered first from any compensation granted.

Finality of Court Rulings: Courtesy of the Government Majority?

The government, however, did not only stick to the rhetoric. First, it is now planning to do a “national consultation”, a non-representative survey of sorts with highly suggestive and often nonsensical questions, asking people whether they support the “prison business” and the availability of such compensation claims, as well as whether they would agree that any compensation for inhuman treatment granted will be rerouted to the victim of the crime.

Second, the governing majority also adopted the already mentioned “abuse law” that orders the suspension of the execution of final court orders granting compensation to detainees until June 15th 2020 (Act Nr. 4 of 2020 on Urgent Actions to Stop the Abuse of Compensation Claims Due to Prison Overcrowding). As opposed to what was announced and what is still repeated by government spokesmen, this does not affect court rulings decided before the “abuse law” came into effect, but does apply to any final court order based on the still valid compensation rules that are decided after that (Sections 436 Subsection 14-15 of the Act Nr. 240 of 2013 on the Execution of Criminal Sanctions Custodial Administrative Sanction as amended with effect on the 7 March 2020). Supposedly this is just a temporary measure, but what is the point? Unless the government plans to retroactively change the law in a way that would affect these final rulings either in the value or the modalities of the claim, the suspension makes no sense. And if it does plan to change them, that is an even more fundamental breach of rule of law principles than “suspending” the execution of final court rulings.

To be clear: critiques of policy aside, a parliamentary majority can change a law it adopted any time if it deems that it is not working the way it had envisioned to work. But such a decision is only compliant with rule of law principles if it applies to claims filed after the new compensation regulation comes into effect or at most making their ways through the court system and does not put executable ones in legal limbo. The suspension has thus far-reaching effects on the rule of law.

What if, for example, a claimant decides to enforce the claim granted in a final court order that is decided today, or next week before the courts? The new law, at the end of the day, orders the state not to pay, and does not explicitly prohibit the courts not to enforce the claim against the state. How would a judge react when having to decide on an enforcement action in light of a proper parliamentary act ordering state organs not to pay?

The suspension, especially in connection with the constant drumbeat of anti-judicial noises coming from the government-aligned press, and the upcoming “national consultation” can also have a considerable chilling effect on the courts. Even though under the currently still valid law the courts do not have much room not to grant compensation once inhuman conditions are established, they might now be tempted to play for time and extend the period used to consider the claim via all sorts of procedural and bureaucratic measures. Because whatever they decide now, even though the ruling is based on valid law, will not be executed. The number of claims such informal pressures can affect is considerable: there were 7197 claims making their way through the court system at the end of 2019.[3)]Source: Response to a Freedom of Information Request of the Hungarian Helsinki Committee by the National Office of the Judiciary (2019.OBH.XII.B.31/5, 2020.01.16).

More fundamentally, the suspension touches upon a central element of the rule of law: the finality of court rulings. By legislating to suspend them, the government majority is sending a message that it does not see final court rulings as really final: rather, their finality can be “suspended” if political expediency so requires. And if their enforcement can be suspended for one month, what prevents the majority from

now on to suspend the execution for one year, ten years, or indefinitely, for that matter?

References

- 1. These numbers include rejected claims, but excluding claims rejected on formal inadmissibility grounds. Source: Response to a Freedom of Information Request of the Hungarian Helsinki Committee by the National Office of the Judiciary (2019.OBH.XII.B.31/5, 2020.01.16). The author is grateful to the Hungarian Helsinki Committee for providing this data.
- 2. According to the response, the total compensation claims paid by the state was approx. 679 million HUF in 2017, 3,16 billion HUF (9,2 million EUR) in 2018 and 4,42 billion HUF (13 million EUR) in 2019. In the period 2017 january 1 and 2019 february 28 the largest claim paid amounted to 10,2 million HUF (30.000 EUR), the smallest to 1200 HUF, the daily minimum according to the law. Source: Response to a Freedom of Information Request of the Hungarian Helsinki Committee by the Ministry of Justice (V/57/3/2019 and V/37/2/2020).
- 3. Source: Response to a Freedom of Information Request of the Hungarian Helsinki Committee by the National Office of the Judiciary (2019.OBH.XII.B.31/5, 2020.01.16).
